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10/761,042	01/20/2004	Kami L. Bechyne	KCC 4778.2 (K-C 17, 571.2	1196
321	7590	03/19/2007	EXAMINER	
SENNIGER POWERS ONE METROPOLITAN SQUARE 16TH FLOOR ST LOUIS, MO 63102			FIDEI, DAVID	
			ART UNIT	PAPER NUMBER
			3728	

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EXAMINER


ART UNIT	PAPER
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Commissioner for Patents


David T. Fider
Primary Examiner
Art Unit: 3728



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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/761,042

Filing Date: January 20, 2004

Appellant(s): BECHYNE ET AL.

Richard L. Bridge Reg. No. 40,529
For Appellant

SUPPLEMENTAL EXAMINER'S ANSWER

This is in response to the appeal brief filed July 28, 2006 appealing from the Office action mailed December 22, 2006.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The following are the related appeals, interferences, and judicial proceedings known to the examiner which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal:

Appeal No. 2006-1928
Application No. 10/760,877
Technology Center 3700

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

6,059,100	Jones	5-2000
6,115,997	Burrow et al	9-2000

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

DETAILED ACTION

Claim Rejections - 35 USC § 103

1. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

2. Claims 1-5 are rejected under 35 U.S.C. 103(a) as obvious over Jones (Patent no. 6,059,100) in view of Barrow et al (Patent no. 6,115,997). A feminine hygiene disposal package 10 is disclosed for carrying pads comprising a receptacle 12 having an interior 14 in which a plurality of disposable containers 20 are located. The difference between the claimed subject matter and Jones resides in package 10 carrying a supply of pads in the receptacle.

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Barrow et al discloses that it is well known to those skilled in this art to supply disposable feminine hygiene pads in a container that not only serves to carrying a new pad but also serves to hold the used pad, see col. 1, lines 23-30. It would have been obvious to one of ordinary skill in the art to modify the system of Jones by incorporating a supply of pads in the containers in view of the teaching of Barrow et al, in order to obviate the need to have a separate individual packages, provide the pads associated together in a single receptacle and economize material by using the same container twice.

To the extent that Jones does not employ such a press-fit closure, Official Notice is taken for the use of press fit members as a notoriously old and well known means for closing a bag. It would have been obvious to one of ordinary skill in the art to employ press fit members in view of Official Notice, order to provide a convenient means for closing the bag.

As to claim 2, the manner in which the blank is folded to form the bag is a product by process type of limitation. A "product by process" claim is directed to the product per se, no matter how actually made, In re Hirao, 190 USPQ 15 at 17(footnote 3). See also In re Brown, 173 USPQ 685; In re Luck, 177 USPQ 523; In re Fessmann, 180 USPQ 324; In re Avery, 186 USPQ 161; In re Wertheim, 191 USPQ 90; and In re Marosi et al, 218 USPQ 289, all of which make it clear that it is the patentability of the final product per se which must be determined in a "product by process" claim, and the an old or obvious product produced by a new method is not patentable as a product, whether claimed in "product by process" claims or not. During examination, the patentability of a product-by-process claim is determined by the novelty and non-obviousness of the claimed product itself without consideration of the process for making it which is recited in the claim. In re Thorpe, 227 USPQ 964 (Fed. Cir. 1985), M.P.E.P. § 2113.

As to claims 3 and 4, an opaque material is contemplated in col. 3, line 62 in Jones. To employ a plastic film at least partially opaque would have been obvious for the reason of concealing the contents of the bag.

As to claim 5, each of the feminine hygiene products is sealed in their own container.

(10) Response to Argument

The same combination of references before the Administrative Patent Judges is essentially the same combination as advanced by the Examiner in Appeal No. 2006-1928, supra.

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The difference being an additional reference was relied upon in Appeal No. 2006-1928 for a teaching of a zip-lock type of closure fastener that is not employed herein.

In any event Appellant argues the combination of US Patent no. 6,059,100 (Jones) over US Patent no. 6,115,997 (Burrow et al) failing to suggest alone, or in combination, a supply of pads in the receptacle in a hygienic conditions, see page 5, 2nd and 4th paragraph in the present brief.

In the prior appeal “The appellants argue: (1) it would not have been obvious to one of ordinary skill in the art to modify the system of Jones in view of the teaching of Burrow; and (2) even when combined, Jones and Burrow fail to teach or suggest a package comprising a receptacle and a supply of pads in the receptacle in a hygienic condition. (Appellants' Brief, pp. 7, 9)”, see page 5, first full paragraph in Appeal no. 2006-1928. In responding to the same comments advanced herein as in said appeal, supra, the Patent Judges concluded;

“With regard to the scope and content of the prior art, we find that Jones discloses a feminine hygiene product disposal system (10) including a main container (12), a sealable top (16) and a plurality of disposal containers (20). Each disposal container (20) is designed for holding a used feminine hygiene product and has a sealable opening (24). (Jones, col. 3, lines 45-54). The sealable opening (24) is formed by a locking track (38). (Jones, col. 4, line 4). We further find that Burrow discloses that it is well known in the feminine hygiene product packaging art to individually package (emphasis added) disposable feminine hygiene articles using a resealable cover sheet that allows the user to re-use the package for disposal of a used pad. (Burrow, col. 1, lines 23-30)”, page 6 last paragraph to page 7 first paragraph of the Boards' Opinion.

We (The Board in their prior opinion) also find that although Burrow teaches using the same package for holding a new pad and discarding a used pad, Burrow also does not teach or suggest by itself using a main receptacle to hold a supply of pads that are packaged within individual disposable packages. Essentially concurring with the Examiner's position as previously establish and advanced herein, see page 6, the second one lined paragraph of the prior opinion, supra.

As such it would have been obvious to one of ordinary skill in the art to modify the system of Jones by incorporating a supply of pads in the containers in view of the teaching of Barrow et al,

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in order to obviate the need to have a separate individual packages, provide the pads associated together in a single receptacle and economize material by using the same container twice.

With regard to Jones lacking any disclosure or suggestion for a package that has a supply of interlabial pads in a receptacle in hygienic condition, page 3 of the present Brief, this issue has been previously addressed in the context of the present art.

Page 8 of said opinion, *supra*, states;

“We find that the prior art of record in the present case demonstrates that one of ordinary skill in the art at the time of the invention was aware of the problem of being able to easily and discreetly carry multiple feminine hygiene products throughout the day, and that one of ordinary skill in the art had similarly solved this problem by creating composite packages for holding multiple individually-wrapped pads or similar products. (See e.g., International Patent Application, publication number WO 99/26576 (published June 3, 1999) and European Patent No. EP 0419770 (published April 3, 1991)). We further find that one of ordinary skill in the art at the time the invention was made was familiar with individually wrapping feminine hygiene products to maintain the articles in a hygienic condition, and that it was well known to reuse the wrapping for disposal of used articles. (See Burrow, col. 1, lines 23-30)”. Accordingly, the Examiner incorporates such arguments herein in response to Appellant’s position that a receptacle for storing pads in a hygienic condition has not been established herein. Accordingly, it is urged such arguments be found non-persuasive for the same reasons as those previously set forth in Appeal No. 2006-1928, Application No. 10/760,877.

With regard to the prior art providing a supply of interlabial pads individually packaged in single package, this limitation is not even present in claim 1. Only claim 5 introduces this feature where the interlabial pads are said to be individually packaged. In any event this limitation has been fully considered as noted above where Burrow is characterized as providing individually packaged feminine hygiene articles. Accordingly, Appellant’s arguments are not persuasive for these reasons.

As to Appellant’s arguments regarding the efficacy of the statutory holding under 35 USC 103, given the previous consideration of these same references for a similar finding under obviousness, the further case law cited is non-convincing in that the motivation and suggestion


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for the combination has been previously considered. Accordingly, it is submitted the present rejections be maintained for those reasons previously advanced.

(11) Related Proceeding(s) Appendix

See "(2) Related Appeals and Interferences" above.

Respectfully submitted,
dtf
January 30, 2007



David T. Fidei
Primary Examiner

Conferees:



Mickey Yu
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JILA M. MOHANDESI
PRIMARY EXAMINER